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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1943.

MICHAEL W. ALBANO, *Petitioner,*
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF SPRINGFIELD, COUNTY OF HAMPDEN, COMMONWEALTH OF MASSACHUSETTS,

AND

BRIEF IN SUPPORT THEREOF.

EDWARD M. DANGEL,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
PETITION	1
Summary statement of matters involved	1
Jurisdiction	2
Questions presented	3
Reasons for granting writ	4
BRIEF	6
Argument	6

Table of Authorities Cited.

CASES.

Cooke v. United States, 267 U.S. 517	6, 8, 10
Dale v. State, 198 Ind. 110	7
Dawe v. Morris, 149 Mass. 188	9
Deaton, In re, 105 N.C. 59	6
Nye v. United States, 313 U.S. 33	7
People v. Andalman, 346 Ill. 149	9
People v. Stone, 181 Ill. App. 477	8
Ratliff, ex parte, 117 Tex. 325	8
Snyder v. State, 151 Ind. 553	8
Sona v. Aluminum Castings Co., 214 Fed. 326	6
Stricker, ex parte, 109 Fed. 149	7

TEXTBOOKS.

31 A.L.R. 1226	6
49 A.L.R. 647	7

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF SPRINGFIELD, COUNTY OF HAMPDEN, COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Supreme Court of the United States:

The petition of Michael W. Albano respectfully shows:

Summary Statement of Matters Involved.

The petitioner was held to be in direct criminal contempt of court by the Springfield District Court, Hampden County, Commonwealth of Massachusetts, in a matter wherein he was not appearing as attorney of record (Record, p. 11, *l.* 19) and over which the Springfield District Court had not acquired jurisdiction. The matter improperly before the District Court at the time was that of two parking violations charged against the petitioner's sister, Rose M. Albano. Complaints had been filed in the court, but the record as sent to the Supreme Judicial Court does

not show that any warrant or summons was issued as required by Massachusetts law (Mass. Gen. Laws (Ter. Ed.) c. 218, sec. 32). The petitioner was in the Springfield District Court on the morning of December 8, 1939, and learned of the scheduled hearing on the complaints. At the direction of the court, the petitioner attempted to find his sister and to bring her in for trial. After two officers had testified and he had been allowed to ask one of them questions, he was held for direct contempt. This finding of contempt was based on facts and circumstances which occurred, for the most part, beyond and outside of the hearing and view of the court. The petitioner, without an opportunity to explain or defend, was cited, fined, and jailed for direct criminal contempt. The petitioner brought a petition for writ of error in the Supreme Judicial Court of Massachusetts, which was heard by the Honorable Louis S. Cox and reported by him to the Full Court for consideration. The Supreme Judicial Court handed down an opinion, which may be referred to and is made a part hereof, on February 28, 1944, affirming the judgment of the Springfield District Court (Record, pp. 13-17), stating "these facts cannot be altered, added to, or otherwise challenged in this proceeding" (Record, p. 14, *l.* 35).

Jurisdiction.

It is submitted that the final judgment as entered in the Springfield District Court in accordance with the rescript of the Supreme Judicial Court is repugnant to Articles V and XIV of the United States Constitution, wherein it is established: "Nor shall any state deprive any person of life, liberty, or property without due process of law." Further, it is repugnant and in opposition to decisions of this Honorable Court concerning what constitutes indirect or constructive contempt, and what constitutes direct or

criminal contempt. Further, the questions involved seem to be unique and never before presented to this Court for adjudication, and your petitioner believes the case properly invokes United States Code, Title 28, section 344(b).

Questions Presented.

1. Is the record submitted by the Springfield District Court, wherein it is found the petitioner was held for direct criminal contempt on facts which did not exist in the full personal knowledge of the court, and as to which the petitioner had no opportunity to explain, off-set, or defend, adequate and sufficient in law?

2. Where a record is written and prepared by the judge making the citation in contempt, must it not state completely and fully the subsidiary facts on which the judgment as to direct contempt is based?

3. Where the laws and statutes of a state do not provide for a hearing or trial on a charge of direct criminal contempt, was the petitioner entitled to alter, add to, or challenge the facts on writ of error before a tribunal possessing jurisdiction over the record submitted?

4. Was the Supreme Judicial Court of Massachusetts justified in overlooking the question of procedure as to whether this was direct or indirect contempt?

5. Should not the review of the Supreme Judicial Court have been such as to enable the aggrieved party "to obtain right and justice . . . completely, and without any denial; conformable to the Laws" (Const. of Mass., Decl. of Rights, Art. XI)?

6. Did the Supreme Judicial Court err in treating the entire matter as one of direct criminal contempt?

7. If any contempt existed, can a court vitalize contemptuous conduct previously purged or condoned?

8. Was the petitioner guilty of direct contempt of court where the contempt is not based on facts immediately preceding it but from other circumstances leading up to the judgment in contempt or remote thereto?

9. Where the question of personal animosity and bias is alleged, are the rights of the petitioner jeopardized by the failure of the reviewing body to accept evidence as to this animosity and bias?

10. Where an individual intends no contempt and his behavior is not such as to make this conclusion untenable, is he entitled to be advised of the charges or of his possible contempt and be given an opportunity to explain, answer, or defend?

11. If under the statutes of Massachusetts no adequate review is available in matters of direct criminal contempt, is this a violation of the due process clause of the Constitution?

12. If the Springfield District Court had no jurisdiction over the person and subject-matter contained in the original complaints, could it enforce its will on the petitioner, who was not counsel in fact or of record, issue directives, and then hold him in contempt in the event of failure to carry out the directives?

Reasons for Granting Writ.

The Constitution of the United States guarantees to the people the protection of those fundamental rights without which liberty does not exist. In this matter your petitioner was held in contempt, fined, and jailed without an opportunity to plead or to say anything in his defense. He was charged with direct criminal contempt, when, if any contempt existed, it was constructive or indirect, entitling him to be faced with charges and be given an opportunity to defend.

In many states, not possessing adequate means of review in contempt matters, the question of whether or not a person is guilty of direct criminal contempt is a vital one. Admitting that a court should maintain decorum, it does not necessarily follow that a judge should be allowed to use his office to force his personal desires or will on members of the bar, using the power of contempt as a club to wreak vengeance on former or present political enemies. To tolerate such tactics would result in a breakdown of the very liberties for which our nation stands.

Further, a study of the record of the Springfield District Court (Record, pp. 8, 9) reveals that it contains generalities without specifying the facts on which the judge based his conclusions. These conclusions and generalities add nothing to the specific findings. The findings, without the conclusions, contain nothing of a contemptuous nature.

A decision by this Honorable Court on the questions presented herein will go far toward clarifying the law of contempt in the Commonwealth of Massachusetts, so far as it involves rights guaranteed by the United States Constitution. The petitioner makes this appeal in the interests of justice and the furtherance thereof.

Wherefore it is respectfully submitted that the petition should be granted.

EDWARD M. DANGEL,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference to the official report of the opinion in the court below, grounds on which the jurisdiction of this Court is invoked, statement of the case, and the questions presented are set forth in the petition.

Argument.

A *direct* contempt consists of something done, or omitted to be done, in the presence of the court, tending to impede or interrupt its proceedings or reflect upon its integrity. It occurs only when the acts constituting the contempt have been committed in the presence of the court.

Cooke v. *United States*, 267 U.S. 517.
31 A.L.R. 1226.

An *indirect* contempt is synonymous with *constructive* contempt. It consists of an act having a tendency to obstruct and embarrass or prevent the due administration of justice, done at a distance and not during the session of the court or in its immediate view and presence.

31 A.L.R. 1226.

When the court has not full personal knowledge of the entire facts and circumstances of the matters charged as contempt it is necessary that the facts be set forth in an affidavit before the court in order to give the court jurisdiction to issue an order to show cause.

Sona v. *Aluminum Castings Co.*, 214 Fed. 326.
In re Deaton, 105 N.C. 59, at 64.

If any part of the alleged contemptuous conduct was constructive contempt, then the court's procedure was wrong. The petitioner had a right in such instance to the benefit of "due process of law," which required that "testimony should be heard publicly, in open court, and by both sides to the controversy, after due notice to the accused of what is alleged against him, in order that he may have the opportunity to meet and explain it."

Ex parte Stricker, 109 Fed. 149.

In the case at bar the alleged contemptuous conduct was not all committed *in the presence of the court.*

Dale v. *State*, 198 Ind. 110.
49 A.L.R. 647.

What occurred outside the courtroom was not direct contempt.

Nye v. *United States*, 313 U.S. 33, at 52.

The truth or falsity of the petitioner's statement that his sister was in the court-house at that time required search by persons outside of the courtroom. The trial judge depended upon observations and acts of third persons made outside of his physical presence.

Depending upon testimony of others were the following factors:

1. Whether the petitioner was in the court-house.
2. Why the accused was absent for the length of time that he was.
3. What he was telephoning about.
4. Whether the petitioner had reasonable cause to believe that his sister was in the court-house.

5. Whether the petitioner's sister was there at the time of the representation.
6. Whether the petitioner's sister had gone out of the court-house so that she was not there at the time of the search by the police officers.

Cooke v. *United States*, 267 U.S. 517, at 535.

Therefore it is an inescapable conclusion that the court's judgment, of necessity, had to be based upon the testimony of others. In such an instance the offender must have notice and a trial, and due process requires such notice and trial. The making of a statement as to the whereabouts of his sister, which the court subsequently found, on consideration of the statements of police officers, to be false, did not justify the petitioner's punishment as for *direct* contempt.

People v. *Stone*, 181 Ill. App. 477.
Ex parte Ratliff, 117 Tex. 325.
Snyder v. *State*, 151 Ind. 553 (*attorneys improperly held meeting in court-house—not direct contempt*).

Although the Court took no action against the petitioner until after his sister Rose M. Albano appeared for trial, and during the cross-examination of one of the witnesses for the Commonwealth, yet the District Court judge assigned as one of his reasons for holding the petitioner in contempt that "He [the petitioner] did misrepresent to the Court on two occasions in requesting a delay in the trial . . . that the said defendant was present in the court house and would shortly appear in the court room for trial" (p. 8, *ll.* 23-26). The petitioner "was then ordered by the Court to produce said defendant and the Court directed officers of the Springfield Police Department . . .

to make a search of the building for said defendant, the said defendant not being found therein" (p. 9, *ll.* 3-7). The Court then found "in fact that the said Michael W. Albano knew that said defendant was not in the court house at the time said representations were made" (p. 9, *ll.* 1-2).

The petitioner's statement was divided into two parts, namely, that she (*a*) was present in the court-house (p. 8, *ll.* 5-6) and (*b*) would shortly appear in the courtroom for trial (p. 8, *ll.* 6-7).

The statement that his sister was present in the court-house was taken by the judge to mean an actual representation of a present existing fact. He seems to have anticipated that the petitioner had a criminal intent, an actual evil design, without any reasonable expectation that his sister was within the court-house. His subsequent finding of this fact resulted because the police officers could not find her within the building. It is evident that the judge gave no consideration to the question of the state of mind of the petitioner, but, be that as it may, this representation was immaterial: the important fact was whether Rose M. Albano "would shortly appear in the court room for trial." This part of the statement was true. She came for trial, although she was not obliged to do so.

Dawe v. *Morris*, 149 Mass. 188, at 191.

In order for the judgment of a trial judge for direct contempt to be valid, it must be predicated *entirely* on what occurred in his presence while the court was in session. A court cannot deal summarily with an offender committing the contempt outside the court's presence, and cannot punish him without hearing evidence.

People v. *Andalman*, 346 Ill. 149.

The accused was entitled to—

(*a*) be advised of the charges;
(*b*) have a reasonable opportunity to meet them by way of defense or explanation;
(*c*) have assistance of counsel;
(*d*) have the right to call witnesses to give testimony; and
(*e*) offer evidence in mitigation of the alleged offense.

Cooke v. *United States*, 267 U.S. 517, at 537.

Due process of law required proceedings that would respect the foregoing rights of the accused.

Respectfully submitted,

EDWARD M. DANGEL,
Attorney for Petitioner.